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No. 04-939

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

MARY ANN MCGUIRE, RUTH SCHIAVONE,
AND JEAN B. ZARRELLA,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

A Massachusetts law, which is largely modeled on the statute upheld in *Hill v. Colorado*, 530 U.S. 703 (2000), creates a six-foot "buffer zone" around persons who are within 18 feet of the entrance to a reproductive health care facility, within which six-foot zone others may not (without consent) enter "to engage in oral protest, education or counseling."

The questions presented are:

1. Whether, under the First Amendment, the law discriminates on the basis of content because it applies only near the entrances to facilities that perform abortions.

2. Whether the law, because it exempts clinic employees from the "approach" restriction when they assist patients to safely reach the clinic entrance, impermissibly discriminates against petitioners' speech on the basis of viewpoint.

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STATEMENT OF THE CASE

Massachusetts Buffer Zone Act

In 2000, the Massachusetts Legislature enacted "An Act Relative to Reproductive Health Care Facilities," Mass. St. 2000, c. 217, now codified at Mass. Gen. Laws c. 266, § 120E½ (hereafter "the Act"). Pet. 2-4. The Act was passed following a long history of intense and confrontational protests at reproductive health care facilities in Massachusetts over the bitterly divisive issue of abortion. Appendix to the Petition for a Writ of Certiorari (hereafter "App.) 95a-96a. (legislative findings).

The Act creates, in effect, a "floating" six-foot buffer zone around persons and vehicles as they approach reproductive health care facilities ("RHCFs"). App. 71a.[1] The Act makes it unlawful, within these areas, for any person to "knowingly approach" within six feet of another person or occupied motor vehicle, without the consent of the person or the vehicle's occupant, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person." Pet. 2. This restriction applies only in the "area within a radius of 18 feet of any entrance door or driveway to a reproductive health care facility"and in the rectangular area "not greater that six feet in width created by extending the outside boundaries of [such entrance doors to the] street . . . ." Pet. 2-3.[2] Thus, although the

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[1] The Act defines "reproductive health care facilities" as "place[s], other than within a hospital, where abortions are offered or performed." Pet. 2.

[2] In addition, the prohibition on approaching non-consenting (continued...)

Act restricts "approaches" within the defined area, it does not require a standing speaker within this area to move away from anyone passing by. App. 75a. As the First Circuit summarized: "[T]he Act . . . affects only areas immediately adjacent to RHCFs; prohibits only nonconsensual approaches within six feet; and applies only within a clearly marked eighteen-foot radius from clinic entrances and exits." App. 89a.

The Act exempts four categories of persons from the restriction on nonconsensual approaches in § 120E½(b): (1) "persons entering or leaving [a reproductive health care facility]," (2) "employees or agents of such facility acting within the scope of their employment," (3) "law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment," and (4) persons using the sidewalk "solely for the purpose of reaching a destination other than such facility." Pet. 3.[3]

The Massachusetts Legislature expressly set forth its purposes in the Act, the first of which was "to increase the public safety in and around reproductive health care facilities." App. 96a. (Mass. St. 2000, c. 217, § 1) Second, the Legislature aimed "to maintain the flow of traffic and prevent congestion around reproductive health care facilities." *Id.* Third, the

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[2](...continued)
persons is in effect only during the business hours of the reproductive health care facility and only if the restricted area has been "clearly marked and posted." Pet. 3.

[3] The Act also provides criminal penalties where a person "knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility[.]" Pet. 4.

Legislature intended "to enact reasonable time, place and manner restrictions to reconcile and protect both the First Amendment rights of persons to express their views, assemble and pray near reproductive health care facilities and the rights of persons seeking access to those facilities to be free from hindrance, harassment, intimidation and harm." *Id.* Finally, the Legislature aimed "to create an environment in and around reproductive health care facilities which is conducive towards the provision of safe and effective medical services, including surgical procedures, to its patients." App. 97a.

Petitioners' Protest and Sidewalk Counseling Activities

The petitioners believe that abortion is murder and is detrimental to the physical and emotional health of women. C.A. App. 8. They regularly express their views through protest and "sidewalk counseling" outside reproductive health care facilities in Boston and Brookline. App. 4a. Their particular sidewalk counseling includes passing out leaflets, engaging in conversations, and offering assistance to women they believe are entering the clinic for an abortion, all in an attempt to dissuade them from doing so. App. 4a. Petitioners' protest and sidewalk counseling is limited to two locations: the Boston clinic of Planned Parenthood League of Massachusetts ("PPLM") and Repro Associates, located in Brookline. App. 4a-8a.[4]

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[4] Both PPLM and Repro Associates are places where abortions are performed. Both also offer family planning services, gynecological examinations, pregnancy testing and other reproductive health care services. C.A. App. 70, 72. They are therefore "reproductive health care facilities" as defined in the Act. Pet. 2.

When they are involved in sidewalk counseling, the petitioners try to approach women they believe are clinic patients as far as possible from the clinic entrances, to maximize their time to talk to those who continue toward the clinic. App. 5a, 6a, 8a. As a result, petitioners generally approach women well outside of the area restricted by the Act, which is the last 18 feet before the clinic entrance, and try to speak to them at a distance of less than 6 feet. Id.

On Saturday mornings, PPLM uses patient escorts in front of and near its Boston facility. Although these escorts serve as volunteers, PPLM has established their duties and responsibilities and provided them training. App. 4a.[5] At the times and locations that petitioners McGuire and Zarrella conduct their "sidewalk counseling," there are no escorts present. C.A. App. 719-720, 744. Although there are clinic escorts present when petitioner Schiavone conducts her sidewalk counseling at Planned Parenthood on Saturdays, Schiavone has never complained to the police or other law enforcement personnel about the conduct of the escorts. App. 31a, 51a.

None of the plaintiffs has been arrested for violating the Act. App. 5a. Only one person (a "pro-life" protester at PPLM in Boston) has been arrested for violating the Act; the arrest

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[5] On some days, certain individuals go to the area in front of and near Repro Associates in Brookline to "escort" women who are approaching that facility. They have no affiliation with Repro Associates and receive no compensation, training, support or direction from Repro Associates. C.A. App. 73, 294, 296-302, 306-307. For that reason, the Brookline Police take the position that these individuals are not within the Act's exemption for "employees or agents of [an RHCF] acting within the scope of their employment." *See* App. 11a.

occurred after repeated warnings from the Boston Police over a period of months. App. 10a.

Police Enforcement of the Act

The policy of both the Boston and Brookline police is not to arrest anyone for violation of the Act without at least one warning. According to the officer commanding the Boston precinct in which PPLM is located, the Boston Police enforcement policy on the buffer zone law is to be fair to both sides of the abortion debate, to be flexible, and always to warn a potential violator first and then to try to mediate before making an arrest. Both pro-life protesters and clinic escorts have received warnings from the Boston Police at the PPLM clinic. App. 10a. The responsible Brookline Police official testified that his Department's policy on enforcement of the Act is to first warn the person engaging in potentially unlawful conduct, and then videotape the activity. Only then, if the conduct persists, would the Brookline Police take enforcement action in the nature of an arrest. App. 11a. Persons expressing both anti-abortion and pro-choice views have received warnings from Brookline Police officers at Repro Associates. App. 11a.

Implementation of the Clinic Employee Exemption

As discussed above, the Act exempts several categories of persons from its "approach" restrictions, including "employees or agents of [reproductive health care facilities] acting within the scope of their employment." Mass. G.L. c. 266, § 120E½(b)(2).

Attorney General's Interpretation. Since the Act took effect, the Attorney General has interpreted § 120E½(b)(2) to exempt clinic escorts from the Act's "approach" restrictions only when they assist patients to safely reach the clinic, but not

if they engage in protest, education, or counseling. App. 9a. In 2000 and 2001, when the Act was first implemented, representatives of the Attorney General conveyed this interpretation to both Boston and Brookline police and clinic officials, in person and in writing. App. 8a-9a, 67a n. 8. In February 2003, the Attorney General's office sent letters to police officials and district attorneys in the four Massachusetts municipalities with reproductive health care facilities affected by the Act (*i.e.* Boston, Brookline, Worcester and Springfield) again setting out this interpretation of the clinic employee exemption. App. 8a, n. 1. *See* C.A. App. 702-704, 705, 708, 711, 714. The letters stated, in part, that "all persons in the restricted area, including clinic employees and agents, are subject to the restrictions in § 120E½(b) of the Act, including the restriction on oral protest, education, or counseling[,]" and that clinic escorts may not use the exemption to "express their views about abortion [.]" The letters also stated that the clinic employee exemption "permits clinic employees and agents to speak as necessary to perform such duties as helping patients gain safe access to a clinic, but not to use that opportunity to express their views about abortion or otherwise to engage in 'protest, education or counseling.'" *See* C.A. App. 702-704, 705, 708, 711, 714.

Police Department Interpretation. The Boston and Brookline Police Departments have followed the Attorney General's interpretation of the clinic employee exemption. App. 10a-11a. For example, the Boston Police Department views the Act as permitting clinic escorts to escort patients into the clinic and to offer them assistance in that regard. App. 10a. In that Department's view, the Act prohibits escorts from approaching patients within the restricted area (without consent) to counsel, leaflet, or educate them. *Id.*

PPLM Escort Protocol. In response to the Act, PPLM revised its escort protocol. PPLM requires each clinic escort to sign the revised protocol, which instructs the escort:

> Do not address the protesters or say anything to the patient about the protesters' comments, including your own views. Do not take protesters' brochures from the patient if she has taken one. If conversation is warranted . . . talk about neutral topics such as the weather. If the patient appears to be upset and stressed, you can encourage her to stay calm.

C.A. App. 875, 905 (PPLM 2001 escort protocol). Under the same protocol, before providing assistance escorts must first identify themselves to patients and ask whether the patient would like to be escorted inside the clinic; the protocol states that "if [the patient] says or indicates yes, then walk in with her; if she replies negatively, the escort must withdraw." C.A. App 875, 905.

The 2001 PPLM escort protocol is in marked contrast to the PPLM escort policy *before* the Act took effect, under which escorts were permitted to speak more freely, including to reassure a patient that she was permitted to make her decision regarding abortion. C.A. App. 908, 910. In the Petition, petitioners quote at length from the *pre-Act* escort policy, Pet. 8, ¶ 1, but fail to point out that this policy was superceded when the Act took effect.

Lower Court Proceedings

District Court. On November 3, 2000, petitioners filed their complaint seeking declaratory and injunctive relief against the Act, which was scheduled to take effect November 10,

2000. They challenged the Act, on its face, under the First Amendment and other provisions. App. 102a-103a. After a hearing, the district court preliminarily enjoined enforcement of those provisions of the Act that restrict non-consensual approaches near clinic entrances. App. 112a-113a. The court held that the Act imposed a content-based restriction on speech because it applies only at abortion clinics. App. 109a. The court also held that the Act's clinic employee exemption discriminates on the basis of viewpoint because employees "have a strong financial interest or philosophic incentive to counsel the listener to undergo an abortion . . . ." App. 110a.

Court of Appeals ("McGuire I"). The First Circuit reversed the district court's order granting a preliminary injunction, holding that "the Act, on its face, lawfully regulates the time, place, and manner of speech without discriminating based on content or viewpoint." App. 72a.

The court reviewed the Act "through the prism of *Hill v. Colorado*, 530 U.S. 703 (2000)," in which this Court upheld Colorado's more extensive floating buffer zone statute against a First Amendment challenge. App. 71a. The court first noted that a floating buffer zone law does not directly regulate speech, but only restricts its time, place or manner. App. 74a-75a. The court then considered whether the Act is content-neutral, even though it operates only near the entrances to reproductive health care facilities. App. 81a. For the court, the key question – answered in the affirmative – was whether the Act "serves a legitimate purpose unrelated to expressive content;" – if so, "it is deemed content-neutral even if it has an incidental effect on some speakers and not others." *Id.* at 44, citing *Hill*, 530 U.S. at 736, and *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). After considering extensive testimony that was taken at the legislative hearing on the Act, the court concluded that the need to combat violence and the other negative "secondary

effects" of protests at abortion clinics provided a content-neutral justification for the Act's focus on these facilities. App. 81a-83a. The court found that "targeting these sites furthers conventional objectives of the state's police power — promoting public health, preserving personal security, and affording safe access to medical services." App. 81a.

Under a similar analysis, the court rejected petitioners' argument that the Act discriminates on the basis of viewpoint – in favor of "pro-choice" positions – because of its exemption for "employees or agents of [a reproductive health care] facility acting within the scope of their employment." Mass. G.L. c. 266, § 120E½(b)(2). App. 83a-87a. Because it is within an escort's scope of employment to "assist in protecting patients and ensuring their safe passage as they approach RHCFs," the court held that the employee exemption serves the Act's goals of advancing public safety and protecting access to health care services, both of which are unrelated to expressive content. App. 84a. The court did, however, note that if "experience shows that clinic staffers in fact are utilizing the exemption as a means either of proselytizing or of engaging in preferential pro-choice advocacy, the plaintiffs remain free to challenge the Act, as applied, in a concrete factual setting." App. 87a.

Having concluded that the Act is a content-neutral "time, place and manner" restriction, the court considered, under the intermediate scrutiny test, whether the Act "is narrowly tailored to serve significant state interests while leaving open ample alternative channels of communication." App. 87a-88a, citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The court held that the Act readily meets this test. The court found that the purposes advanced by the Act – increasing public safety and safeguarding access to medical services, among others – "are firmly rooted in the state's traditional police powers [and are] precisely the sort of

interests that justify some incidental burdening of First Amendment rights." App. 88a. citing *Hill*, 530 U.S. at 715. The court also found the Act narrowly tailored because it "affects only areas immediately adjacent to RHCFs; prohibits only nonconsensual approaches within six feet; and applies only within a clearly marked eighteen-foot radius from clinic entrances and exits." App. 89a.

District Court after Remand

After remand from the court of appeals, petitioners pressed their claim that the clinic employee exemption, as applied, permits escorts to engage in "preferential pro-abortion advocacy within the restricted areas" in violation of the First Amendment. App. 49a. The district court granted respondents' motion for summary judgment, holding that, on the facts presented, petitioners had not shown that the enforcement of the statute amounted to viewpoint discrimination.[6] The court noted that the Attorney General had interpreted the Act "so as to require evenhanded enforcement . . . even against clinic employees and agents," and that his "interpretation has been adopted by the law enforcement authorities." App. 52a-53a. In addition, the court found that petitioners produced no evidence that the State, with respect to conduct in the buffer zone, was "ignoring the speech activities of favored speakers (or . . . prosecuting, issuing warnings, or unduly beleaguering only disfavored speakers)." App. 53a. Finally, the court noted that petitioners' evidence "focuses almost entirely on the conduct of clinic escorts," but held that since the escorts were private actors, and there was no evidence of unequal treatment by law

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[6] Earlier, the district court granted summary judgment for respondents on petitioners' facial challenge to the Act, in view of the First Circuit's decision in McGuire I. App. 68a, n.10.

enforcement, petitioners' as-applied claim failed for lack of state action. App. 54a-56a.

Court of Appeals ("*McGuire* II")

On appeal, the First Circuit affirmed the district court's grants of summary judgment rejecting petitioners' facial and as-applied claims. App. 1a-32a. With respect to petitioners' facial claim, which was directed primarily at the clinic employee exemption, the court determined that petitioners' had advanced "no reason why the conclusion [it] reached in *McGuire I* . . . is flawed." App. 20a. Following this Court's settled precedent, the court explained that, because the Act promotes a neutral legislative purpose, it is deemed content neutral even if it has an "incidental [] . . . adverse effect on certain messages while leaving others untouched." App. 18a, citing 80a. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Accordingly, because the Act advances legitimate and neutral goals, the court found it content-neutral even though petitioners asserted that, in practice, the Act "has a tendency to burden pro-life speech more than it burdens pro-choice speech." App. 18a

The court also rejected petitioners' as-applied challenge, which again was directed mainly to the clinic employee exemption. The court explained that this claim must be based on proof that the Act, although neutral on its face, "has been enforced selectively in a viewpoint discriminatory way." App. 25a, citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002) (requiring proof of "a pattern of unlawful favoritism"). "Such a challenge is dependent on the factual evidence provided as to how the statutory scheme has in fact operated vis-a-vis the plaintiffs." App. 25a. After an extensive examination of this evidence and "resolving all factual disputes in [petitioners'] favor, the court rejected the as-applied claim. See App. 3a-13a, 29a-31a. The court explained that "even if

the [petitioners] have produced some evidence that pro-abortion individuals violated the statute . . . they are stymied because there is no evidence that the police turned a blind eye toward pro-abortion speech while not turning a blind eye to possible transgressions by plaintiffs." App. 30a.[7] The court concluded that "on the evidence, [the Act] has been applied evenhandedly to both sides . . . ." App. 31a.[8]

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[7] The court also stated: "The evidence shows that the police responded to all incidents involving pro-abortion personnel to which they have been made aware. [The police] cannot be expected to be made aware of every incident, particularly when, as the district court noted, 'none of the plaintiffs has complained to the police or to any other law enforcement authority about any oral protests, education, or counseling being engaged in by employees and agents at clinic entrances.'" App. 30a-31a, quoting district court opinion at 51a.

[8] The court also rejected, for lack of state action, petitioners' argument that an as-applied violation was established simply by petitioners' testimony that clinic escorts, acting on their own, interfered with petitioners' activities in the buffer zone. The court noted that these complaints were about "purely private action" and "only the government can violate First Amendment rights." App. 22a.

REASONS FOR DENYING THE WRIT

I. The Petition Fails to Show a Conflict in the Courts Below or Present an Issue of National Importance that Merits Review in this Court.

The petition fails to satisfy any of the traditional criteria for a grant of certiorari. Petitioners seek review only on the ground that the court of appeals incorrectly applied this Court's settled First Amendment precedent to two particular features of the Massachusetts "buffer zone" law. Pet. 12-13, 23-24. *See* Pet. 24 (urging that Court should not leave First Circuit's "misreading of this Court's First Amendment precedent unreviewed"). Petitioners make no argument that a decision by this Court will settle a conflict in the lower courts or resolve any pending question about other States' laws. Indeed, it is obvious from the petition that a decision by this Court would decide issues arising *only* under the Massachusetts Act. And, to the extent petitioners argue that the Act, as applied, violates the First Amendment (by reference to petitioners' deposition testimony concerning the conduct of PPLM escorts and the particular responses of the local police), *see* Pet. 20, review is particularly unwarranted, as a decision by this Court would be confined to the unique facts of this case, which petitioners nowhere assert are replicated in other settings across the country.

The question of whether a narrowly tailored floating buffer zone statute – restricting not speech but only non-consensual "approaches" – violates the First Amendment was answered just five years ago in *Hill v. Colorado*, 530 U.S. 703 (2000). Whereas the Colorado law upheld in *Hill* created an eight foot floating buffer zone and covered areas within 100 feet of any health care facility, the Massachusetts law creates only a six foot buffer zone that operates within 18 feet of the

entrances to reproductive health care facilities. For that reason, the court of appeals found that the Act is "more precisely focused and gives abortion protesters more opportunity for advocacy than does the Colorado statute upheld in *Hill*." Pet. App. 89a. Plainly, after *Hill*, there is nothing in the modest provisions of the Massachusetts Act – requiring only that patients be permitted a six foot buffer for the last eight to ten steps they take before entering a clinic – that warrants review by this Court.

In view of *Hill*'s controlling authority, petitioners directed their First Amendment claims at two features of the Massachusetts Act that differ from the Colorado statute: (i) the fact that the Act regulates conduct only near reproductive health care facilities, rather than at all health care facilities, and (ii) the Act's exemption of clinic employees acting "within the scope of their employment" from the ban on non-consensual approaches within the 18 foot restricted area. Because these claims (of content and viewpoint discrimination, respectively) challenge only unique features of the Massachusetts Act, they do not merit review by this Court. Petitioners make no argument that there are laws in other jurisdictions with these features, much less an argument that the courts of appeals have reached conflicting holdings in reviewing such provisions.

As the First Circuit held, both the Act's focus on freestanding abortion clinics and its exemption permitting clinic workers to assist patients safely to reach the clinic promote the same neutral goals that supported the constitutionality of the Colorado law in *Hill* – "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Hill*, 530 U.S. at 715. *See* Pet. App. 81a, 84a. *See also Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 376 (1997) (governmental interests in public safety and "protecting a

woman's freedom to seek pregnancy-related services" justified appropriately tailored injunction to secure unimpeded access to abortion clinics). Because a decision in this case would not resolve an issue of broad importance, and because the court of appeals faithfully applied *Hill* and other settled precedent to uphold the specific, challenged features of the Massachusetts Act, this Court should deny review.

II. Petitioners' Challenge to the Clinic Employee Exemption is Premised Upon a Construction of this Provision that the State Courts Have Not Considered.

Petitioners have asked this Court to review their claim that the Act's exemption for clinic employees acting "within the scope of their employment," on its face, discriminates on the basis of viewpoint in violation of the First Amendment. Petitioners' challenge rests on the assumption that, within the 18 foot restricted area, the exemption necessarily permits clinic escorts (even without consent) to approach patients closer than six feet to engage in pro-abortion protest, education or counseling. *See* Pet. 19 (asserting that employees' speech within the exemption "will *necessarily* express the clinic's view") (emphasis in Petition). As yet, no Massachusetts court has considered the scope or proper construction of this exemption.[9]

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[9] Under a procedure available in Massachusetts for advisory opinions on proposed legislation, the Justices of the Massachusetts Supreme Judicial Court opined that a prior proposed version of the Act, establishing a fixed 25 foot buffer zone, would not violate the First Amendment. *Opinion of the Justices to the Senate*, 430 Mass. 1205, 723 N.E.2d 1 (2000). The Justices did not, however, address any aspect of the clinic employee exemption.

The First Circuit, however, rejected petitioners' argument that the employee exemption must be construed as having the "sole practical purpose . . . to promote a particular side of the abortion debate[.]" Pet App. 85a.[10] Instead, after examining the Act's extensive legislative history, the court held that a "likely" explanation of the Legislature's purpose was to exempt "clinic workers — just as it exempted police officers — in order to make crystal clear . . . that those who work to secure peaceful access to RHCFs need not fear prosecution." So construed, the exemption would not violate the First Amendment. Pet App. 86a-87a. Similarly, the Massachusetts Attorney General construed the exemption as protecting escorts *only* when they approach and speak to a patient as necessary to help the patient safely access the clinic (*i.e.* when escorts are "acting within the scope of their employment"), but *not* if they approach to express their own or the clinic's views about abortion or other topics. App. 8a-9a. *See* C.A. App. 702-704, 705, 708, 711, 714.

Ultimately, the meaning of the clinic employee exemption is a question of state law that only the Massachusetts Supreme Judicial Court can definitively decide.[11] Indeed, a state court construction of the Act upholding the Attorney General's present interpretation would dispose of, or at the very least materially alter, the plaintiffs' challenge to the clinic

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[10] *See* Pet App. 85a (rejecting argument that the "exemption only has meaning . . . insofar as it allows those who work for RHCFs to approach within six feet of non-consenting patients to engage in such activities (i.e., education, protest, and counseling).").

[11] Even petitioners acknowledge that the exemption lacks "the definitive judicial construction" given the Colorado law by the Colorado Supreme Court prior to review by this Court in *Hill*. Pet. 22, citing *Hill*, 530 U.S. at 719.

employee exemption. *Cf., e.g., Paulussen v. Herion*, 475 U.S. 557, 559 (1986) (per curiam) (declining to rule on constitutionality of state law where state court interpretation of related law could render constitutional claim irrelevant). Thus, concerns for comity and federalism urge that this Court not accept this case for review only to make an unnecessary constitutional determination as to state law. "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). *See also Harrison v. NAACP*, 360 U.S. 167, 176 (1959) ("[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them"). Under this time-honored principle of restraint, the Court should deny the petition.

III. The Court of Appeals Correctly Applied this Court's Precedents in Holding that the Act is Both Content Neutral and Viewpoint Neutral.

A. That the Act applies only at places that offer or perform abortions does not make it a subject matter restriction on speech.

Because the Act restricts only conduct (*i.e.* close, non-consensual approaches within the 18-foot restricted area), it is not a subject matter restriction on speech. Like the Colorado statute, the Massachusetts Act "does not forbid the statement of any position on any subject . . . . What it forbids, and all it

forbids, is approaching another person closer than [six] feet (absent permission) to deliver the message." *Hill*, 530 U.S. at 737-38 (Souter, J., concurring). Moreover, "[t]he fact that speech by a stationary speaker is untouched by this statute shows that the reason for its restriction on approaches goes to the approaches, not to the content of the speech of those approaching." *Id.* That the Act operates only at "reproductive health care facilities" – defined as "place[s], other than within a hospital, where abortions are offered or performed" – does not transform its neutral ban on close "approaches" into a subject matter restriction on speech.

The Massachusetts Legislature addressed the Act to areas immediately adjacent to the entrances to reproductive health care facilities because, quite simply, it was in these locations that the Act's restriction on close, non-consensual approaches were needed to protect patients.[12] Petitioners rely on reasoning specifically rejected in *Hill* when they assert that the Act imposes a subject matter restriction on abortion-related speech because it is applicable only at freestanding clinics that perform abortions, rather than at hospitals generally. In *Hill* the Court found "flawed" a dissenting Justice's view – which petitioners echo – that a statute restricting speech becomes unconstitutionally content-based when it applies "to the specific locations where [that] discourse occurs." *Hill*, 530 U.S. at 724. *See id.* (explaining that a "statute prohibiting solicitation in airports that was motivated by the aggressive approaches of Hare Krishnas does not become content based solely because its application is confined to airports"). Rather, as the Court has "repeatedly explained, government regulation of expressive activity is 'content neutral' if it is justified without reference to

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[12] The Legislature's findings show plainly that the harms it sought to address arose specifically at freestanding clinics that offer or perform abortions. See Pet. App.95a-96a (setting out findings).

the content of regulated speech." *Hill*, 530 U.S. at 720, citing *Ward*, 491 U.S. at 791. The court of appeals applied this familiar test to conclude, correctly, that the Act's stated goals of protecting public safety and access to medical care "justify its specific application to RHCFs [reproductive health care facilities]." App. 81a.

In reaching this conclusion, the court of appeals observed that "[b]y the late 1990s, Massachusetts had experienced repeated incidents of violence and aggressive behavior outside RHCFs." App. 72a. Testimony at a legislative hearing "chronicled the harassment and intimidation that typically occurred outside RHCFs[,] . . . the emotional and physical vulnerability of women seeking to avail themselves of abortion services, . . . and the deleterious effects of overly aggressive demonstrations on patients and providers alike." Id. In these circumstances, the court of appeals found that "targeting these [reproductive health care centers] further[ed] conventional objectives of the state's police power — promoting public health, preserving personal security, and affording safe access to medical services." App. 81a. Because these objectives are "unrelated to the content of expression" the Act is deemed neutral even if it has an "incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. App. 80a-82a. *Cf. Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 762-64 (1994) (rejecting claim that injunction against anti-abortion protesters, imposing 36 foot buffer zone around abortion clinics, was content or viewpoint based). That the Legislature may have been motivated by the "conduct of the partisans on one side of [the] debate" and the impact of such conduct on clinic patients did not make its legislative purposes illicit; the Court explicitly rejected that

argument in *Hill*. 530 U.S. at 724-25, citing *Frisby v. Schultz*, 487 U.S. 474, 482 (1988). n. 1.[13]

B. The clinic employee exemption does not discriminate on the basis of viewpoint because, properly construed, it permits only "approaches" intended to facilitate patient safety.

The court of appeals also correctly rejected petitioners' claim that the Act discriminates in favor of "pro-choice" views because of its exemption for "employees or agents of [a reproductive health care] facility acting within the scope of their employment." Pet. 3. The court held that this exemption serves the Act's goals of advancing public safety and protecting access to health care services, both of which are unrelated to expressive content. Pet. App. 84a. *See Hill*, 530 U.S. at 719-720 (endorsing these goals as content-neutral) The court again relied upon the extensive legislative record, which "contain[ed] numerous accounts of incidents in which clinic personnel had to approach patients to protect them from protesters and, sometimes, to prevent physical altercations." Pet. App. 84a.

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[13] In addition, the Act's focus on freestanding reproductive health care facilities narrowly tailors it to the problem at hand, a feature that supports, rather than detracts from, its constitutionality. *See Hill*, 530 U.S. at 730 (law narrowly tailored where limited to "the place where the restriction is most needed"). Indeed, the petitioners in *Hill* challenged the Colorado law as *overbroad* because it extended to all health care facilities, rather than just abortion clinics. *See Hill* 530 U.S. at 730 ("[Petitioners] argue that the statute is too broad because it protects too many people in too many places, rather than just the patients at the facilities where confrontational speech had occurred.").

The court reasoned that since "it is within the scope of their employment for clinic personnel to escort patients in this fashion, and since a primary purpose of the law is to facilitate safe access," the employee exemption serves the Act's neutral legislative goals and, accordingly, does not discriminate on the basis of viewpoint. *Id. Cf. Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (viewpoint discrimination occurs where "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the [speech] restriction.").[14]

Petitioners nonetheless urge that even if the exemption protects a clinic escort only when she offers to help a patient gain "peaceful access" to a reproductive health care facility, the exemption favors "speakers offering access to abortion." Pet. 21. In practical effect, however, the exemption does no such thing by simply permitting clinic escorts to approach patients – who are already within 18 feet of the entrance – to assist them to safely reach the clinic door. In this respect the clinic employee exemption serves the same neutral purposes as the exemption in subsection (b)(3) of the Act for police officers. *See* Pet. 3. Petitioners have not challenged the police officer

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[14] As discussed above, the court of appeals rejected petitioners argument that the exemption must be construed to permit clinic escorts to engage in "pro-choice" advocacy in the 18-foot area where petitioners are restricted. App. 29a-30a, 85a-86a. In doing so, the court properly took cognizance of the Massachusetts Attorney General's content-neutral interpretation of the exemption. Pet. App. 8a-9a (summarizing Attorney General's interpretation). *See Ward*, 491 U.S. at 795-96 ("[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered"), quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc*, 455 U.S. 489, 494 n.5 (1982).

exemption as viewpoint-based and doubtless would not claim that a police officer's offer to help a patient reach the clinic door is "viewpoint" based.

Under the Attorney General's interpretation of the exemption, which was given weight by the court of appeals, escorts in the restricted area cannot "express their views about abortion or otherwise [] engage in 'protest, education or counseling.'" C.A. App. 705, 708, 711, 714. *See* App. 8a-9a, 29a-30a. So viewed, the exemption does not, as petitioners argue, "represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people." Pet. 19 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (internal quotation omitted)). Rather, it simply promotes the State's neutral legislative goals of "preserving personal security, and affording safe access to medical services," App. 81a, and, accordingly, does not reflect an impermissible bias against petitioners' views.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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